



Supreme Court of the United States.

OCTOBER TERM, 1944.

No. 281.

SAMUEL SANDBERG ET AL.,
Petitioners,

v.

NEW ENGLAND NOVELTY CO., INC.

PETITION FOR REHEARING.

SIDNEY S. GRANT,
Attorney for Petitioners.

SAMUEL E. ANGOFF,
HAROLD B. ROITMAN,
Of Counsel.



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This petition is brought because of the question of public interest in protecting the right of freedom of speech in the Commonwealth of Massachusetts. The original petition for certiorari was confined to the aspects of this case which were limited to the defendants. The jurisdictional facts in the case were set forth fully therein. However, it should be pointed out that this case is but one of a number which have arisen in Massachusetts on the vital question of peaceful picketing as an exercise of freedom of speech under the Federal Constitution.

Citizens of Massachusetts, including the petitioners, have been subjected to an ever narrowing interpretation of this right by the Massachusetts Courts at the same time that this Court, in a series of decisions, was widening and strengthening the principle that peaceful picketing is an aspect of the freedom of speech guarantee in the First and Fourteenth Amendments of the United States Constitution. The exercise of this right in Massachusetts has been constricted by a series of cases which preceded the decision in

this case, but which, for reasons beyond the control of the present petitioners, were never brought before this Court for consideration and review.

These cases materially affected the decision in the present case. They have formed a pattern of law in Massachusetts which is at variance with the decisions of this Court and which requires review not only in behalf of these petitioners, but also for the protection of the people within the Commonwealth in their future exercise of the right to peacefully picket.

This Court first noted the right of peaceful picketing as an exercise of the constitutional right to free speech in *Senn v. The Tile Layers' Protective Union*, 301 U.S. 468, and further clarified and strengthened this principle in a series of cases including the following:

American Federation of Labor v. Swing, 312 U.S. 321.

Bakery & Pastry Drivers' Local v. Wohl, 315 U.S. 769.

Cafeteria Employees Union v. Angelos, 320 U.S. 293.

Carlson v. California, 310 U.S. 106.

Journeyman Tailors' Union v. Miller's Inc., 312 U.S. 658.

Thornhill v. Alabama, 310 U.S. 88.

Peaceful picketing as a component part of the right of free speech is guaranteed under the Constitution by these cases. It may only be limited or abridged when there is a "clear and present danger to the State." *Schenck v. United States*, 249 U.S. 47.

The principle of free speech is guaranteed by the Federal Government under the First and Fourteenth Amendments, and a state is forbidden to deprive anyone of this right by

statute, order or court decree. The principle of *Erie Railway v. Tompkins*, 304 U.S. 64, has no application here where it is the duty of the Federal Government to protect all the people in their exercise of these rights from encroachment by any source.

The Courts of the Commonwealth of Massachusetts have attempted, however, to ignore the effect of this Federal doctrine by establishing their own limitations under which the right of peaceful picketing may be exercised. The Massachusetts Supreme Judicial Court has decided that it may limit the right to freedom of speech to those instances where, in its own judgment, the right to peacefully picket was exercised in a cause and manner which it considered wise, just or legal without regard to the clear and present danger test, which this Court has stated is the only limitation to these rights.

The cases which the Massachusetts Supreme Judicial Court have decided subsequent to the *Senn v. Tile Layers* case on the question of peaceful picketing illustrated the extent to which this right has been limited and circumscribed in this Commonwealth. *Simon v. Schwachman*, 301 Mass. 573, decided December 15, 1938, ruled that peaceful picketing by one picket who walked in front of the plaintiff's shop saying:

"Do not patronize this store"

"Do not cross the picket line"

"This store is unfair to organized labor"—

was unlawful and enjoined because it stated that the purpose of the speech was to secure the employment of union members and the ultimate establishment of a closed shop.

Quinton's Market, Inc., v. Patterson, 303 Mass. 315, decided June 5, 1939, sustained an award of damages and an

interlocutory injunction imposed against members of a labor union who were attempting to establish a local custom of half holidays on Wednesdays for retail markets in the summer months. About twenty members of the union, which had secured this benefit for its members in other stores, picketed the plaintiff's store. The Massachusetts Court prevented them from speaking freely on this subject because they felt that they were not proper persons to make such speeches and because they felt the subject-matter was not an appropriate one for members of the union to discuss.

Fashioncraft, Inc., v. Halpern, 313 Mass. 385, decided March 29, 1943, involved the peaceful picketing of the plaintiff's factory. One of the aims of this peaceful picketing was to secure a closed shop. Although the contention that peaceful picketing was an exercise of the right to free speech under the United States Constitution was specifically raised, the Massachusetts Supreme Judicial Court decreed that the state was not required to tolerate such picketing unless it found that such picketing was for the accomplishment of a lawful purpose and done by lawful means. Since the Court did not consider the attempt by the employees and the union to obtain a closed shop to be a lawful objective, it enjoined the workers from exercising the right to peacefully picket the plaintiff's factory.

These cases establish the pattern that the Massachusetts Court would uphold the validity of an injunction against peaceful picketing and that it did not consider that the guarantee of freedom of speech in the First and Fourteenth Amendments of the United States Constitution required it to modify the prerogative which it had assumed of determining when, where and for what objective it would allow workers to exercise this right within the confines of the State of Massachusetts.

It is with this background that the present case arose. The previous cases indicated that an appeal on the injunction would not only be a time-consuming process, but one promising little or no results. The petitioners were involved in a strike. The issue was crucial to them. Unless they could exercise the right of freedom of speech by using the method of peaceful picketing during the progress of the strike where the issue was being decided, their theoretical right of freedom of speech was only of academic interest. The decisions of this Court in cases previously cited led them to believe that, so long as their conduct was peaceful, they were within their constitutional rights. When the injunction was issued, there was nothing in its language to lead them to presume otherwise and, in fact, the local civic authorities concurred in this view. Record, pp. 11, 12.

The injunction issued against the defendants in this case expressly reserved to them their constitutional rights of free speech and free press. This reservation contained in paragraph 6 of the injunction states:

“There is no attempt hereby to limit the statutory or constitutional rights of either party to peacefully persuade or exercise their rights of free speech and of free press.”

The inclusion of Paragraph 6 indicated that the injunction was not based on the doctrine of *Milk Wagon Drivers v. Meadowmoor Dairies, Inc.*, 312 U.S. 287, since under that doctrine the reservation would have been unnecessary.

What was apparently indicated was that the defendants could continue to peacefully picket under their rights of free speech and free press as defined by this Court. But when the judge's charge to the jury that peaceful picketing could in and of itself be considered coercive because of the mere presence of the pickets was upheld by the Supreme

Judicial Court of Massachusetts, it became obvious that from its inception the entire proceedings followed the restrictive and unconstitutional Massachusetts doctrine, completely at variance with this Court's conception of constitutional rights.

The defendants had the right to assume that paragraph 6 of the injunction was to be interpreted in accordance with this Court's decisions. The failure of the Massachusetts Court to do so and its rigid adherence to its patently unsound construction of Federal rights invaded the constitutional guarantees which the defendants had a right to rely upon.

The action for contempt and the judge's subsequent charge to the jury were based on the absence of any Federal right of freedom of speech by these employees. If the petitioners could be jailed and fined for such peaceful action, then it is clear that the Federal guarantee is an illusion and a sham, as it has been applied in Massachusetts.

This is the first of these Massachusetts decisions to be brought before this Court. The failure of this Court to grant certiorari would discourage even a courageous individual from attempting to exercise this right within the confines of Massachusetts. Not only would such an individual be subjected to an injunction, but also to potential jail sentences and fines. This Court should hear the case on its merits.

See *Thomas v. Collins*, 64 S. Ct. 785.

It has been long established that the constitutional guarantee for freedom of speech, freedom of press, freedom of assembly and freedom of worship means freedom from prior restraint rather than the dubious right of long and expensive litigation, especially where a denial of certiorari in

this case illustrates that such an appeal to judicial process would end in a closed circle in the Massachusetts Courts.

Even if the injunction was appropriate, its construction by the Massachusetts Courts was so distorted and the encroachment on the constitutional rights of the defendants so severe that the doors of this Court should be open.

Wherefore the petitioners pray that this petition for rehearing should be granted.

Respectfully submitted,

SIDNEY S. GRANT,

Attorney for the Petitioners.

SAMUEL E. ANGOFF,
HAROLD B. ROITMAN,
Of Counsel.

UNITED STATES OF AMERICA.

BOSTON, MASSACHUSETTS.

OCTOBER 31, 1944.

Now comes Sidney S. Grant, counsel, and certifies that the within petition for rehearing is presented in good faith and not for delay.

SIDNEY S. GRANT.

Sworn to before me this 31st day of October, 1944.

ARTHUR V. GETCHELL,

Notary Public.

My commission expires December 6, 1946.